SERVED: February 19, 2008

NTSB Order No. EA-5363

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
WASHINGTON, D.C.

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 15th day of February, 2008

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, Complainant, v. RUSSELL G. HENDRIX, Respondent.	)	Docket SE-18067

OPINION AND ORDER

Respondent appeals the October 17, 2007 order of Administrative Law Judge William R. Mullins.[1] By that order, the law judge granted the Administrator's motion for summary judgment as to the emergency order of revocation of respondent's

[1] A copy of the law judge's order is attached.

mechanic certificate with airframe and powerplant ratings.[2] We deny respondent's appeal.

The Administrator's July 18, 2007 emergency revocation order, which now serves as the complaint, alleged that respondent was not qualified to hold a mechanic certificate with airframe and powerplant ratings, because he failed, after being directed to do so by his employer, to appear for a random drug test. This alleged failure was deemed to be a refusal to submit to drug testing, pursuant to 14 C.F.R. part 121, Appendix I, *Drug Testing Program*, § II, *Definitions*,[3] and 49 C.F.R., part 40, *Procedures for Transportation Workplace Drug and Alcohol Testing Programs*, subpart I, *Problems in Drug Tests*, § 40.191(a)(1).[4] Also, the complaint asserted that revocation was the appropriate sanction for respondent's alleged refusal.[5]

---

[2] Respondent waived the expedited procedures normally applicable to emergency revocation proceedings under the Board's rules.

[3] Title 14 C.F.R. part 121, App. I, § II states that "refusal to submit" means that an employee engages in conduct including but not limited to that described in 49 C.F.R. 40.191.

[4] **Section 40.191 What is a refusal to take a DOT drug test, and what are the consequences?**

> (a) As an employee, you have refused to take a drug test if you:
>
> (1) *Fail to appear for* any test ... consistent with applicable DOT agency regulations, after being directed to do so by the employer. ...

[5] See 14 C.F.R. § 65.23(b)(2).

Following discovery, the Administrator filed a motion for summary judgment, contending that there was no genuine issue of material fact in the case. The law judge granted the motion. On appeal, respondent argues that genuine issues of material fact do exist, and that the Board should reverse the law judge's ruling.

Our Rules of Practice allow a party to file a motion for summary judgment on the basis that the pleadings and other supporting documentation establish that there are no material issues of fact to be resolved, and that the party is entitled to judgment as a matter of law. 49 C.F.R. § 821.17(d). We have previously considered the Federal Rules of Civil Procedure to be instructive in determining whether disposition of a case via summary judgment is appropriate.[6] In this regard, we recognize that Federal courts have granted summary judgment when no genuine issue of material fact exists.[7]

In his answer to the complaint, in discovery submissions, and in his appeal brief, respondent has admitted to all material facts that the complaint alleges. He admitted that he was an

---

[6] Administrator v. Doll, 7 NTSB 1294, 1296 n.14 (1991) (citing Fed. R. Civ. P. 56(e)).

[7] Celotex Corp. v. Catrett, 477 U.S. 317, 322-24 (1986) (issue is *genuine* if evidence is sufficient for reasonable fact-finder to return verdict for non-moving party); Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248, 255-56 (1986) (fact is *material* when it is relevant or necessary to ultimate conclusion of the case).

employee of Autopilots Central; that he was considered to be performing a safety-sensitive function; and that he was subject to random drug testing under 14 C.F.R. part 121, Appendix I, Section V., *Types of Drug Testing Required*, subsection B, *Random Testing*. See Answer and Respondent's Appeal Br. at 1. He acknowledges that on December 22, 2005, the designated employee representative for Autopilots Central directed him to report for a random drug test, and that he agreed to report for the test after a break. Respondent also acknowledges that, within a few minutes after that, before the end of the break, he unilaterally terminated his employment with Autopilots Central, left the company's property, and did not report for the drug test. Id. at 1-2. Despite his apparent stipulation to these material facts, respondent argues now that other "[m]aterial facts contested and in dispute include:" that he terminated his employment because his employer "verbally assaulted" him, and that his employer may have known about the random drug test and may have provoked him to terminate his employment. Id. at 3-4. Respondent also argues that it is disputed whether the medical center to which he was to report for the random drug test was actually expecting him to appear for a random drug test, and whether the medical center contacted him regarding his refusal to take a drug test. He further argues that he did not intentionally refuse to submit to the random drug test. Id.

Respondent's underlying contention is that, because he was no longer an employee of the company, his alleged violation is not within the ambit of § 40.191(a)(1), which specifically refers to the terms "employee" and "employer." Respondent's argument has no merit. He was an employee at the time he was directed to submit to random drug testing; he was therefore required to submit to the drug test. What he did after the directive to report to the drug testing center has no bearing on his regulatory duty to submit a urine specimen for testing. As the Administrator argues in his reply to respondent's appeal:

> [if such] self-termination after having been directed to submit to drug testing could serve as a basis to avoid a drug test refusal ... then any ... employee concerned about the possible results of a drug test could circumvent the requirement ... by quitting his job after having been directed to submit to drug testing but before appearing for the drug test.

Administrator's Reply Br. at 17. Just as respondent's argument related to his employment status has no merit, his arguments regarding facts in dispute likewise have no merit. These facts alleged are simply not material. We agree with the law judge that, based on the evidence in the record and on respondent's admissions, summary judgment is appropriate. No factual issue requiring resolution remains.[8]

---

[8] We must comment on respondent's failure to assert specific facts that establish a genuine issue of material fact. A general denial of some regulatory allegations in the complaint, or assertions of immaterial facts are insufficient to defeat a

Respondent alleges that he contacted FAA offices in Dallas and Tulsa and "was told not to worry because he had terminated his employment." Respondent's Appeal Br. at 3. In discovery, the Administrator asked respondent for specifics regarding this assertion. Respondent objected to the request for the complete names of the individuals to whom he spoke at the FAA offices, the dates and times he spoke to them, and a description of the communication, stating that the request was "overly broad, vague and ambiguous." First Discovery Response, Interrogatory No. 11. "Without waiving [his] objection," respondent stated that he was

> unable to recall the names of the individual[s] he spoke with at the FAA office. These two individuals told [him] that they did not believe he had refused a drug test because [he] had terminated his employment.

Id. While it is not clear when these alleged conversations occurred,[9] we infer from the scant clues in the case file that they took place after submission to testing would have been untimely. Even assuming that these conversations took place at a time when respondent might credibly argue that he relied on

---

(..continued)
motion for summary judgment. See Doll, supra. When a motion for summary judgment is made, the burden shifts to the nonmoving party, by affidavits or otherwise, to present specific material facts showing that there is a genuine issue for trial. See id. at 1296. If the nonmoving party does not respond with specific material evidence, summary judgment, if otherwise appropriate, will be entered against the nonmoving party. Id. at n.14.

[9] This is due primarily to respondent's failure to provide such information.

the conversations in making his decision not to submit to drug testing, he is either unable or unwilling to produce evidence about them. As the Administrator argues, respondent has not identified who the individuals are, their titles, their offices of assignment, whether they had authority or competence upon which respondent could have reasonably relied regarding drug testing matters, the nature of any questions asked, or the content of the purported conversations. See Administrator's Reply Br. at n.7. Based on the failure to satisfy his burden to provide sufficient information upon which to base any other determination by the Administrator, the law judge, or this Board, respondent's argument has no merit.

The Administrator further argues that refusal to submit to random drug testing warrants revocation of respondent's mechanic certificate, based on his admissions, and on Board precedent establishing that revocation is the appropriate sanction for refusing to provide a urine specimen. In light of our determination that no genuine issue of material fact exists, and that respondent effectively refused to submit to the drug test, we find that Board precedent warrants revocation of respondent's certificate. Failing to report for directed drug testing constitutes a refusal to submit to a drug test. § 40.191(a)(1). Board precedent provides that "refusal to be tested warrants

revocation."[10] In King, supra at n.10, we acknowledged that revocation may seem harsh in cases in which there has been no determination or showing of actual drug usage.[11] However, as we said there, a respondent's failure to provide a sufficient urine specimen may reflect an effort to evade a positive drug test result, and revocation is the necessary sanction. While King involved a failure to provide a sufficient amount of urine because of alleged "shy bladder syndrome," the same rationale applies here. Hence, we agree with the law judge's granting of the Administrator's motion for summary judgment with regard to the facts of the case and the necessary sanction. Such a result is consistent with Board precedent.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied; and

2. The order of the law judge granting summary judgment is affirmed.

ROSENKER, Chairman, SUMWALT, Vice Chairman, and HERSMAN, HIGGINS, and CHEALANDER, Members of the Board, concurred in the above opinion and order.

---

[10] See Administrator v. Hamrick, NTSB Order No. EA-5282 at 7 (2007), citing Administrator v. King, NTSB Order No. EA-4997 at 3 (2002) (internal citations omitted).

[11] King, at 3.

SERVED OCT. 17, 2007

UNITED STATES OF AMERICA
NATIONAL TRANSPORTATION SAFETY BOARD
OFFICE OF ADMINISTRATIVE LAW JUDGES

* *

Administrator
Federal Aviation Administration,
Complainant,

v.

RUSSELL HENDRIX,
Respondent.

* *

Docket No. SE-18067
JUDGE MULLINS

SERVICE: BY FAX & REGULAR MAIL
JAMES A. BARRY, ESQ.
FAA/AGC-300
800 INDEPENDENCE AVE., SW
WASHINGTON, DC 20591

BY FAX & OVERNIGHT DELIVERY
RICHARD MILDREN, ESQ.
STEPHEN LOUIS CORTES, ESQ.
5801 BROADWAY EXTENSION, #101
OKLAHOMA CITY, OK 73118

ORDER GRANTING SUMMARY JUDGMENT

The Administrator has moved for Summary Judgment alleging that there are no genuine issues of material fact, citing Administrator v. Pinney, NTSB Order No. EA-3545 at 3 (1992). The Administrator, in his Motion, states that Respondent refused to take a drug test under 49 C.F.R. § 40.191(a)(1), and that this refusal has been admitted by Respondent. Respondent has filed his opposition to this Motion.

UNDISPUTED FACTS

On December 22, 2005, during a scheduled break at his Employment with Autopilots Central, Respondent was advised by a Ms. Susan Sparks, the Designated Employee Representative for Autopilots Central, that he, Respondent, had been selected

for a random drug test and the he should report to the testng site as soon as the break was over, and, after this notification, Respondent terminated his employment with Autopilots Central and did not report for the random drug test.

Respondent, through discovery and in his response to this Motion, admits these facts. Respondent does state that the reason for his terminating the employment was because of a disagreement (verbal assault) with Mr. Alan Sparks. This seems to be a distinction without a difference and is not relevant to the failure to take the test.

CONCLUSION

FAR 49 C.F.R. § 40.191(a)(1) provides:

As an employee, you have refused to take a drug test if you:

1. Fail to appear for any test...within a reasonable time, as determined by the employer, consistent with applicable DOT Agency regulations, after being directed to do so by the employer.

Here, the facts are undisputed and "Board precedent provides that 'refusal to be tested warrants revocation' "; Medau, NTSB Order No. EA-4972 (1998).

ORDER

Therefore, the Motion for Summary Judgment is sustained and the Administrator's Emergency Order of Revocation is affirmed.

And it is SO ORDERED.

ENTERED this 17th day of October 2007 at Arlington, Texas.

WILLIAM R. MULLINS
ADMINISTRATIVE LAW JUDGE